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IN THE

SUPREME COURT OF THE UNITED STATES

KOONS BUICK PONTIAC GMC, INC.,
Petitioner,

v.

BRADLEY NIGH,
Respondent.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICI CURIAE IN SUPPORT OF BRIEF OF PETITIONER KOONS BUICK PONTIAC GMC, INC.

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QUESTION PRESENTED

Whether the $1,000 statutory limit originally adopted in 1968 as a cap on Truth in Lending Act ("TILA") recoveries under 15 U.S.C. § 1640(a)(2)(A)(i) has been rendered inapplicable to that subpart by subsequent amendments to Section 1640(a)(2)(A) – despite the lack of any evidence of Congressional intent to effect such change – so that parties who suffer no actual damages may now recover far in excess of the previous $1,000 cap.

IDENTIFICATION OF AMICI CURIAE

The Virginia Automobile Dealers Association ("VADA") is a trade association representing 585 franchised dealers of new and used automobiles throughout the Commonwealth of Virginia. The Maryland New Car and Truck Dealers Association ("MNCTDA") is an association of approximately 320 Maryland franchised new and used car and truck dealers. The Washington Area New Automobile Dealers Association ("WANADA") is a nonprofit trade association representing more than 200 franchised new and used vehicle dealers in the Washington metropolitan area which is comprised of the District of Columbia, Northern Virginia, and suburban Maryland. As a multi-jurisdictional association, WANADA shares many members with VADA and MNCTDA.[1]

All three Associations were formed and maintained for the purposes, among others, of promoting the interests of franchised new and used car and truck dealers, encouraging sound business policies in the interest of the public, and fostering sound and constructive governmental legislation and regulation generally. All three Associations are vitally interested in this matter. Each of the hundreds of members of the Associations sell motor vehicles, a substantial portion of which are financed through Retail Installment Sale Contracts covered by TILA. The question presented has a serious impact on the potential liability of these dealers and the hundreds of thousands of transactions in which they engage annually which are subject to TILA.

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[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, counsel for Amici Curiae authored the brief in whole. No monetary contribution was received toward preparation or submission of the brief, other than monetary contributions by Amici Curiae.

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SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fourth Circuit ("Court of Appeals") has altered and dramatically magnified the potential liability of a credit grantor under the Truth in Lending Act ("TILA"). TILA, as originally enacted 35 years ago, limited the statutory damages to which a creditor could be subjected to no less than $100 and no more than $1,000. The Court of Appeals in this matter interpreted subsequent amendments to TILA, which revealed no Congressional intention to change these limitations on statutory damages as, in fact, eliminating those limitations for financing transactions not secured by real estate. *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119, 126-27 (4th Cir. 2003).[2]

The decision of the Court of Appeals, if followed generally, has a potentially adverse impact on credit grantors who must, at substantial cost, radically increase protective safeguards against any conceivable error in TILA paperwork, increasing the cost of credit and even potentially leading to elimination of certain types of credit.

In reaching its decision, the Court of Appeals approved the granting of exemplary statutory damages so disproportionate to the actual injury that, if awarded in a civil action, they would be constitutionally infirm as a violation of due process.

The decision of the Court of Appeals, combined with earlier decisions severely limiting defenses under TILA, creates a statutory scheme of strict liability for oppressive

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[2] Pursuant to 37.3 of the Supreme Court of the United States, both Petitioner and Respondent consented to the filing of briefs by any and all *amici* who wish to file one.

exemplary damages for technical violations of TILA and must therefore be reversed.

FACTS RELEVANT TO THIS BRIEF

The Respondent, Bradley Nigh, visited the dealership of the Petitioner on February 4, 2000 to purchase a vehicle. He chose a 1997 Chevrolet Blazer. He purchased it under a Retail Installment Sale Contract ("RISC 1") that provided for a $4,000 down payment and, in addition, the trade-in of a vehicle that he owned subject to a security interest with an estimated payoff balance of $7,500.[3]

Approximately three weeks later, the Respondent returned to the dealership in response to Petitioner's request, at which time Respondent was presented with another RISC ("RISC 2") that altered the terms and called for an additional $2,000 down payment. Respondent objected, but agreed to sign RISC 2 and to sign a promissory note for the additional down payment. Approximately one week later, Petitioner contacted Respondent, apparently through his brother, and requested that he again return to the dealership to sign a new RISC ("RISC 3"). Petitioner returned to the dealership on March 5. RISC 3 removed from the agreement the $965 charge for a "Silencer" security system listed on RISC 2 that had not been contracted for and had not been installed. Petitioner signed RISC 3.

Respondent filed suit against Petitioner as a result of the manner in which the sales transactions were conducted, and Petitioner filed counterclaims for the amounts owed on the promissory note and in excess of the original payoff estimate.

[3] This discussion of the facts is based upon the facts reported by the decisions in *Nigh v. Koons Buick Pontiac GMC Inc.*, 143 F. Supp. 2d 535 (E.D. Va. 2001) and *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119 (4th Cir. 2003).

In April 2001, the United States District Court for the Eastern District of Virginia ruled on cross summary judgment motions filed by the parties. *Nigh*, 143 F. Supp. 2d 535. Thereafter, the case went to trial.

The trial resulted in an award to Plaintiff under the Truth in Lending Act for $24,192.80 and under the Virginia Consumer Protection Act for $4,000. App. at 37a-38a.[4] Following the verdict, the Court awarded Plaintiff attorney's fees and costs of $26,129.10. App. at 53a.

Petitioner appealed the decision of the United States District Court for the Eastern District of Virginia to the United States Court of Appeals for the Fourth Circuit which affirmed the decision. *Nigh*, 319 F.3d at 129. A later request for *en banc* reconsideration was denied. App. at 55a-56a.

ARGUMENT

I. THE COURT OF APPEALS' DECISION HAS A POTENTIALLY ADVERSE IMPACT ON CREDIT GRANTORS.

Billions of dollars in financing for motor vehicles annually may be affected by the decision of the Court of Appeals. In 2003 alone, over 16.5 million new cars and light-duty trucks were sold at retail in the United States.[5] In

[4] The Petitioner's Appendix in this matter will be referred to hereinafter as "App."

[5] Between 1998 and 2003, over 100 million new cars and light-duty trucks were sold in the United States:

Year	New Vehicles Sold
1998	15,591,793
1999	16,954,924
2000	17,402,486

Virginia, 455,839 new vehicles were registered in 2003,[6] and in Maryland 320,868 new vehicles were registered in 2003.[7] Annually, nearly twice as many used cars are sold.[8] A very high percentage of all sales are financed. The National Automobile Dealers Association ("NADA") estimates that 70% of new car sales are financed.[9] Consumer borrowing for vehicle purchases has dramatically increased in recent years. In 1989, $290.9 billion in consumer credit resulting from motor vehicle purchases was outstanding, and by 1998, this had increased to $451 billion.[10] Annually, there are millions

2001	17,177,789
2002	16,847,237
2003	16,675,704

Automotive News 2003 Yearbook; *at* http://www.autonews.com/datacenter,; Automotive News Data Center, *Sales, U.S. Total Vehicle by Make - 2003*, *at* http://www.autonews.com/images/dataCenter/1966.pdf.

[6] Virginia Automobile Dealers Association, *Domestic and Foreign Car Tabular 12/28/2002 through 01/02/2004*, *at* http://www.vada.com/frameset1.asp?LINK=dealership&MAIN=dealership_statreports.

[7] Maryland New Car & Truck Dealers Association, *Maryland Auto Outlook*, First Quarter, 2004, Vol. 8, No. 1.

[8] U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES 2002 1011 (2002) reports total vehicle purchases of 45 million vehicles annually. New car dealers alone sold 11.6 million used cars at retail in 2002. *See* 2003 NADA Data Book, *at* http://www.nada.org/Content/NavigationMenu/MediaCenter/NADAData/2003/NADAData_2003.pdf.

[9] National Automobile Dealers Association, *Financing Tips*, *at* http://www.nada.org/NADAGuides/Finance_Tips.htm.

[10] *2000 NADA Data Book at* http://www.nada.org/Content/NavigationMenu/MediaCenter/NADAData/2000/NADAData_2000.pdf (on file with counsel for Amici Curiae VADA and MNCTDA).

of motor vehicle sales transactions generating billions of dollars of credit subject to TILA.

The decision of the Court of Appeals can have a dramatic impact on the financing of sales of vehicles by dealers in Maryland, Virginia, and the District of Columbia, in particular, and in the United States as a whole. Prior to this decision, dealers could sell and finance vehicles with the expectation that their potential liability would be limited. There was no serious dissent from the view that exemplary statutory damages for TILA violations were limited to a minimum of $100 and maximum of $1,000. These Associations will neither restate the statutory history, nor argue in detail Congressional intent. Those subjects are fully explored in the Court of Appeals' decision and the accompanying dissent, and the Amici Curiae Associations expect that these will be fully argued by the parties in this matter.

Instead, these Associations wish to focus on the potential impact of this decision. The decision will allow exemplary statutory damages at double or triple digit multiples of the actual damage suffered by a borrower, and even where no actual damage has been suffered, as in the present case. Respondent in this case suffered no actual damage at all because under RISC 3, Petitioner removed the charge for the Silencer which was improperly included on RISC 2. The "Silencer" included in RISC 2 that was removed from RISC 3 was a $965 item. The resulting verdict from application of the statutory damage formula without limit was $24,192.80. The application of the statutory damage formula in this case thus led to an award of exemplary damages 25 times the cost of the item that was improperly included in RISC 2 and not delivered with the vehicle. The real multiple of exemplary damages to actual damages cannot be quantified since Respondent suffered no actual damages.

Given that the exemplary damages are based on the amount of the finance charges and not upon the amount, if any, of the actual damages suffered by a borrower, the multiple of exemplary damages to the loss from one item for which there was an improper charge could have been much higher. For example, had the dealer's noncompliance been inclusion of a $96 item instead of a $965 item, there would have been little impact on the overall finance charge, but the exemplary damages awarded would have been 250 times the cost of the item.

As another example, in 2002, the average selling price of a new vehicle was $26,163.[11] Financed by an average buyer for five years at an 8% Annual Percentage Rate ("APR") with a 20% down payment, the amount financed would be $20,930, with total finance charges of $4,533 based on a standard amortization table. Statutory damages for a technical violation of TILA will be over $9,000, even though there may not be any compensatory damages at all as a result of the transaction described.

Clearly, a potential liability that is so disproportionate to the actual damages that may be suffered by a borrower or that is imposed even without actual damages will cause credit grantors, in this case car dealers and the finance institutions that accept assignment of RISCs entered into by car dealers, to be far more wary of the credit transactions in which they will participate. Creditors will have to consider steps to limit their liability if Congressionally enacted limits are not applicable. For car dealer credit grantors, additional processes will have to be adopted to prevent any conceivable error, since such an error can lead to exemplary damages of a higher multiple to actual injury than can be Constitutionally imposed

[11] *2003 NADA Data Book, at* http://www.nada/org/Content/NavigationMenu/MediaCenter/NADAData/2003/NADAData_2003.pdf.

for even the most serious, non-reprehensible tortious activity. *See* Argument II, *infra*, at 9-11. These steps, and the likely addition of personnel required to ensure compliance, will increase the cost of lending which must be borne by consumers.

The additional liability may even force creditors to consider whether it is wise to do business with some classes of customers. Dealers may be forced to ask whether transacting business with individuals who have poor credit histories will be worth the cost. These consumers generally borrow at significantly higher interest rates, thus raising the finance charges they pay and raising the potential liability for dealers, in the event of a TILA violation, to a level far in excess of any possible return.

For example, if a consumer with a poor credit history financed the same new average vehicle selling for $26,163, as described *supra*. at 6, for five years with a 20% downpayment at a 19% APR, the total finance charge would be $11,646.90 based on a standard amortization table. A dealer, under the Fourth Circuit's interpretation of TILA, would incur a statutory penalty of over $23,000 for even a minor technical violation of TILA related to such a sale. With the possibility of these damages, almost equal to the price of the vehicle sold and far in excess of any profit on the sale, dealers may be extremely hesitant to conduct business with individuals with a poor credit history.

The potentially adverse impact of this decision on those who provide credit will be imposed in the absence of any evidence whatsoever that Congress intended to eliminate the statutory limitation applicable to finance contracts not secured by real estate. This lack of evidence of Congressional intent was the basis for the Court of Appeals' decision:

> However, the critical point of law – and it is critical – is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent. And, based upon that statute, the far better, and indeed compelled, interpretation is that Congress did alter the statutory cap regardless of its intent.

Nigh, 319 F.3d at 128. To the Court of Appeals, where there was no other evidence of Congressional intent to change the statute, the intent necessary to construe what it believed to be ambiguous statutory language must be gleaned strictly from the ambiguous language itself.

The Court of Appeals' error in this case begins with its determination that the language of the statute is ambiguous. There is nothing ambiguous about the statutory language of Section 1640. Congress clearly set forth that the $1,000 cap shall apply to this "subparagraph." As Petitioner thoroughly explains in its brief, "subparagraph" is a term of art in the drafting of federal legislation which refers to the statutory division that begins with a capital letter of the alphabet. *See* Brief for Petitioner, Argument I. With regards to TILA, "subparagraph" specifically makes reference to Section 1640(a)(2)(A) in its entirety. If the Court of Appeals had applied this meaning of the term "subparagraph" it would never have reached the conclusion that the statutory language is ambiguous, and it would not have needed to inquire as to Congress' intent. When the statutory language is clear on its face, Congressional intent need not be examined. *United States v. Turkette*, 452 U.S. 576, 581 (1981) ("If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'") (*citing Consumer Prod. Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102 108(1980)). From the use of the term "subparagraph," a term

of art, it is clear that it was Congress' intent that the statutory cap apply to individual TILA actions involving credit not secured by real estate.

The Court of Appeals' decision alters 35 years of creditors' understanding of their liability in the event of noncompliance with TILA. TILA is a complex statute for which violations can be found irrespective of either the credit grantor's intent or the true impact on the consumer. *See* Argument III, *infra*, at 12-13. This decision has an incalculable impact upon credit grantors, affecting the individuals to whom they may grant credit, the terms on which credit may be granted, the cost of putting procedures in place for granting credit, and other similar critical issues.

II. THE DECISION APPROVES AN AWARD OF EXEMPLARY/STATUTORY DAMAGES THAT IS SO DISPROPORTIONATE TO THE BORROWER'S ACTUAL INJURY THAT IT IS CONSTITUTIONALLY INFIRM.

Under the decision of the Court of Appeals, statutory damage awards that are dozens and even hundreds of times the size of borrowers' actual injuries, or awards in the absence of actual damages, are a realistic possibility. This Court has repeatedly held that exemplary damages of the magnitude approved by the Court of Appeals, as compared to the actual injury, or in this case the lack of injury, are a violation of due process. Therefore this Court must reverse the Court of Appeals decision and hold that the statutory cap for individual TILA violations is applicable to the amended TILA statute.

The exemplary damages in this case are 25 times the Respondent's compensatory damages, even if the Court assumes the damages are the $965 price of the Silencer despite Petitioner's voluntary subsequent removal of this item

from the transaction. As already noted, if the "Silencer" had been a $96 item instead of $965, the exemplary damages would have been 250 times the compensatory damages. In fact, Respondent suffered no actual damages. If this were a common law case, such an award, judged by the guideposts approved in prior decisions of this Court, would be a violation of due process.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court considered a punitive damages award of $2,000,000 in favor of a purchaser of a motor vehicle which had prior undisclosed damage that reduced the value of the vehicle purchased by $4,000. This Court considered the relationship between that punitive damage award and the compensatory damages suffered in the fraud action filed against the manufacturer of the vehicle. *Gore*, 517 U.S. at 562-570.

In considering the relationship, this Court announced three guideposts to determine whether exemplary damages are disproportionate to the compensatory damages of the Claimant: (1) "the degree of reprehensibility of the nondisclosure;" (2) "the disparity between the harm or potential harm . . . and [the] punitive damages award;" and (3) the difference between the remedy and "the civil penalties authorized or imposed in comparable cases." *Id.* at 575. This Court has reaffirmed these guideposts in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and *State Farm Mut. Aut. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003).

If this were a common law tort case, the award of exemplary damages approved by the Court of Appeals would be found to be a violation of due process when judged by the three guideposts set forth in *Gore*.

A. The First Guidepost of the *Gore* Test

Using the first guidepost of the *Gore* test, the statutory violation found in this case was not a reprehensible act. To determine the reprehensibility of Petitioner's act, the Court must consider whether

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, 123 S.Ct. at 1521.

In signing RISC 2, the Respondent could have suffered an economic loss, but he did not because the Petitioner, finding the problem itself, had the Respondent return to its dealership to sign RISC 3 that removed the "Silencer" from the transaction. The action initially causing economic damages by Petitioner, which was voluntarily cured by the Petitioner thereby causing no actual damage to Respondent, is hardly the basis for strong punitive sanctions.

B. The Second Guidepost of the *Gore* Test

Using the second guidepost of the *Gore* test, the exemplary statutory damages awarded in this case are clearly disproportionate to the potential economic loss. The Amici Curiae Associations agree that there is no bright line for determining the appropriate relationship between exemplary damages and compensatory damages; however, this Court has

made clear that exemplary damages in the magnitude awarded here are clearly questionable:

> With regard to the second *Gore* guidepost, the Court has been reluctant to identify concrete constitutional limits on the ratio between harm or potential harm to the Plaintiff and the punitive damages assessed, <u>but in practice few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process.</u>

Campbell, 123 S.Ct. at 1516 (emphasis added).

In its interpretation of TILA removing the cap applicable to finance transactions not secured by real estate, the Court of Appeals has, in essence, approved a statutory scheme that allows an award of exemplary damages 25 times the loss from one item improperly included in RISC 2 that was subsequently removed from RISC 3. The interpretation approves the award of substantial exemplary damages in the absence of any actual damages. This Court has repeatedly found that such an award violates due process.

C. <u>The Third Guidepost of the *Gore* Test</u>

As to the third guidepost of the *Gore* test, one must look to awards authorized or imposed in comparable cases. This is, of course, a case involving statutory exemplary damages and not common law punitive damages. Nevertheless, if this had been another type of consumer credit case, limitations would apply. If this had been a Consumer Leasing Act case, the maximum statutory award would have been $1,000. 15 U.S.C. § 1640(a)(2)(A)(ii). Likewise, if this had been a case involving financing secured by real estate, the maximum award would have been $2,000. 15 U.S.C. §

1640(a)(2)(A)(iii). Congress even placed a cap on recovery under class action lawsuits to prevent potentially ruinous liability to creditors. *See* Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 93-278, at 14-15 (1973).[12]

The class action cap, in particular, is illustrative of Congress' intent to limit an individual's potential recovery for a creditor's TILA violation. Congress placed a recovery cap of $500,000 or 1 percentum of the net worth of the creditor on all TILA class action lawsuits. 15 U.S.C. § 1640(a)(2)(B). This cap effectively prevents any individual class member from recovering inordinately large damages. For example, an average dealer sells approximately 775 new vehicles per year.[13] Assuming that approximately 70% of these new vehicle purchases are financed,[14] this creates 543 potential TILA claimants per year. TILA has a one year statute of limitations[15] leading to a potential class of 543 new car buyers in a TILA class action against the average new car dealer. In a class action lawsuit involving a class of this size against a dealer with a recovery of the statutory cap of $500,000, the

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[12] "Purpose of the civil penalty section under Truth in Lending was to provide creditors with a meaningful incentive to comply with the law without relying on an extensive new bureaucracy. However, the Committee feels this objective can be achieved without subjecting creditors to enormous penalties for violations which do not involve actual damages and may be of a technical nature. Putting a reasonable limit on a creditor's maximum class action liability would seem to be in the best interest of both creditors and consumers." Senate Comm. on Banking, Housing and Urban Affairs, S. Rep. No. 93-278, at 14-15 (1973).

[13] NADA Data, The New Vehicle Department, *at* http://nada.org/Content/NavigationMenu/MediaCenter/NADAData/20033/NADAData_newvehicle.pdf.

[14] National Automobile Dealers Association, *Financing Tips*, *supra* n. 9.

[15] 15 U.S.C. § 1640(e)

award to each claimant would be approximately $920. This amount is remarkably similar to the cap Congress intended when it imposed the $1,000 limitation on individual actions, and it is a far cry from the $24,192.80 award to the Respondent in this case.

The possibility of such a large damage award in an individual case would, in effect, provide an incentive for parties to file multiple individual actions, evading Congressional imposed limits on class action lawsuits to prevent ruinous damages. Individuals would more likely than not choose to opt-out of class action lawsuits in which they can recover damages of only a few hundred dollars, as illustrated above, for the chance to recover double, or even triple digit multiples of their actual damages, as was awarded in this case leading to multiplicity of litigation - the very thing class action rule were adopted to avoid.

Not only can the award in this case be compared to awards allowed for other actions under TILA, but it can also be compared to awards allowed under similar statutes enacted by Congress which regulate the disclosure of information to the public, like TILA. However, unlike the oppressive and unreasonable statutory awards that result from the Court of Appeals' interpretation of TILA, the awards or penalties for technical violations of these other disclosure statutes are modest and rationally related to the severity of the violation. For example, pursuant to the Consumer Credit Protection Act, 15 U.S.C. § 1692 *et seq.*, any debt collector who fails to comply with the provisions of the act in collecting a debt will be liable for the actual damages sustained and such additional damages that the court may allow, but not exceeding $1,000. 15 U.S.C. § 1692k. Additionally, the penalty prescribed for willfully failing to endorse automotive labels displayed on vehicles for sale, in violation of the Disclosure of Automobile Information Act, shall not be more than $1,000. 15 U.S.C. §

1233(b). It is highly unlikely that it was Congress' intent to place caps on liability in cases involving all other consumer credit transactions regulated by TILA, as well technical and minor violations of other similar disclosure statutes, but allow for statutory damages of double or triple digit multiples of the actual damages, or large exemplary damages in absence of actual damages, for individual TILA claims involving credit not secured by real estate.

D. The Court of Appeals Interpretation of TILA is at Issue.

The *Gore* analysis to determine if a punitive damage award violates due process is especially applicable here because Petitioner is not challenging the constitutionality of TILA itself, but is challenging the Court of Appeals' *interpretation* of TILA. It is that interpretation that goes against years of practice and prior precedent. Statutorily prescribed damages must comply with the due process clause of the Constitution. *See, e.g., St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919). Here, the Court of Appeals' *interpretation* of the statutorily prescribed damages provided by Section 1640 (a)(2)(A) clearly violates due process.

When interpreting statutory language, courts have a duty to interpret statutes as to save them from unconstitutionality. *See Rust v. Sullivan*, 500 U.S. 173, 190 (1991). Courts have been inclined to interpret statutes in this way because courts recognize that Congress is bound to uphold the Constitution and would not therefore draft a statute which infringes on a party's constitutionally protected rights. *Edward J. DeBartolo Corp., v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). In the present case, the Court of Appeals did not follow traditional precedent of construing statutes in accordance with the Constitution, but instead

interpreted Section 1640(a)(2)(A) to violate the due process rights guaranteed by the Constitution.

A statute violates due process when the penalties are "so severe and oppressive as to be wholly disproportional to the offense and obviously unreasonable." *St. Louis, I.M. & S. Ry. Co.*, 251 U.S. at 67; *see also United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992). A statutory penalty will violate due process where the penalty is not rationally related to the legislative purpose of the statute and is arbitrary and discriminatory. *See, e.g, Nebbia v. New York*, 291 U.S. 502, 536-539 (1934).[16] Further, a statutory penalty must give fair notice of the conduct and severity of penalty that may be imposed to comply with due process. *See Gore*, 517 U.S. at 574.

Here, the Court of Appeals' interpretation of Section 1640(a)(2)(A) provides for exemplary damages although the Respondent did not suffer any actual damages. However, assuming, *arguendo*, that Respondent did suffer actual damages in the amount of the item that was improperly included in RISC 2, the Court of Appeals has provided for punitive damages in excess of 25 times the actual damages incurred. This penalty is excessive and disproportionate to the actual damage incurred. *See* Argument II, *supra*, at 11. Further, the Court of Appeals decision effectively eliminates any notice that creditors may have had regarding potential

[16] In *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), *United States v. Citrin*, 972 F.2d 1044 (9th Cir. 1992), and *Nebbia v. New York*, 291 U.S. 502 (1934), the issue before the courts was whether the statute in question, as written, violated due process. These cases held that the statutes complied with the due process. The present case is markedly different. Here, the Petitioner has asked this Court not to determine whether the statutory language of Section 1640(a)(2)(A) violates due process, but rather to determine whether the Court of Appeals' *interpretation* of Section 1640(a)(2)(A), without any evidence of Congressional intent, violates due process.

penalties awarded for TILA violations. For over 35 years, creditors believed, based on the plain wording of the statute, that they could receive a penalty of up to $1,000 for each individual violation claimed. Petitioner, as well as other creditors, up until the time the Fourth Circuit Court of Appeals rendered its decision in this case, had no notice that they could be assessed exemplary damages at double or triple digit multiples of the actual damages, even if no actual damages were incurred, for minor technical violations.

It was the duty of the Court of Appeals to construe the statute in accordance with the Constitution, but it failed to do so. Further, it is the duty of the legislature, not the Courts to enact laws. In this case, the Court of Appeals has attempted to enact a new penalty for individual TILA violations without the authority to do so. The Court of Appeals' erroneous interpretation of Section 1640(a)(2)(A) sanction awards violates the due process rights of creditors and therefore must be reversed.

III. This Decision, Combined with Restrictions on the Bona Fide Error and Cure Defenses under TILA, Creates a Punitive Statutory Scheme of Strict Liability.

Prior court decisions have established TILA as a near strict liability statute, and the decision of the Court of Appeals will allow awards of substantial multiples of actual damages, even when, as here, actual damages did not exist. When TILA was enacted, Congress provided two defenses for errors giving rise to potential liability. A creditor who discovers an error, notifies the obligor of the error, and takes action to cure the error will have no liability under the statute. 15 U.S.C. § 1640(b). Similarly, a creditor cannot be held liable for a bona fide error, provided it maintains procedures reasonably adapted to avoid such an error. 15 U.S.C. § 1640(c).

Over the years, the bona fide error defense has been significantly limited. Courts have limited the defense strictly to clerical errors. *See, e.g., Baker v. G.C. Serv. Corp.*, 677 F.2d 775, 779 (9th Cir. 1982). Moreover, the requirement of evidence showing the establishment of procedures reasonably adapted to avoid any such error has limited the availability of the defense. *See, e.g., Hutchings v. Beneficial Fin. Co. of Or.*, 646 F.2d 389, 391 (9th Cir. 1981).

Similarly, the defense of curative action under 15 U.S.C. § 1640(b) has been significantly limited. Courts have also limited this defense to clerical errors. *See Thomka v. A.Z. Chevrolet, Inc.*, 619 F.2d 246, 251-52 (3d Cir. 1980). Moreover, courts have required a certain formality in the notification of errors and the curative documents: "Without notifying the consumer that the May 27 documents contained errors and that the May 29 documents were curative, defendant cannot use § 1640(b) to avoid liability for violating the [Truth in Lending] Act." *James v. City Home Serv., Inc.*, 712 F.2d 193, 195 (5th Cir. 1983).

Creditors are thus faced with the situation where they can have a technical problem in a TILA contract with no way to cure that problem through a new contract. These creditors will face statutory damage awards that can exceed even the selling price of the product without a way to cure the problem once the contract has been signed.

The decision of the Court of Appeals imposes an interpretation on the statutory scheme which is highly technical and punitive to creditors. Only certain types of errors may be considered clerical errors. Clerical errors will be excused only if there are procedures in place to avoid those errors. And, if there is a problem, simply undoing the problem through another contract is not enough. It must be an error to be cured, and the creditor must follow the formality of

giving actual notification of the need to cure the problem and not just actually cure it. A decision allowing substantial exemplary damages in the absence of actual damages is unjustifiably punitive and this Court should reverse the decision of the Court of Appeals.

CONCLUSION

For the reasons stated in the foregoing Brief of *Amici Curiae*, the Virginia Automobile Dealers Association, the Maryland New Car and Truck Dealers Association, and the Washington Area New Automobile Dealers Association request that this Court reverse the decision of the Court of Appeals and find in favor of Petitioner Koons Buick Pontiac GMC, Inc.

Respectfully submitted.

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